

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff

v.

BRANDON CASUTT,

Defendant

Case No.: 2:20-cr-00231-APG-NJK

Order Denying Casutt's Motion to Vacate

[ECF No. 251]

Brandon Casutt pleaded guilty to wire fraud and concealment money laundering based on COVID-19 relief loans he fraudulently obtained. He moves to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, arguing that his counsel gave ineffective assistance, the prosecution committed misconduct, he is factually innocent, and the government's search warrant and indictment were defective. The government responds that Casutt's counsel was not ineffective, Casutt has not shown any prejudice from the allegedly ineffective representation, and Casutt waived his other grounds to vacate in his guilty plea. Because Casutt has not met his burden on any of his grounds to vacate, I deny his motion.

I. BACKGROUND¹

Casutt applied for loans made available in response to the COVID-19 pandemic through the Paycheck Protection Program (PPP) and Economic Injury Disaster Loan (EIDL) program. In his applications, Casutt falsely represented that his business and nonprofit foundation employed many more employees and had much larger monthly payrolls than they had. Casutt applied for more than \$5.5 million in loans and received at least \$509,775 from the two programs.

¹ All facts are taken from the plea agreement (ECF No. 154), which Casutt swore under oath were true and accurately describe what he did regarding these charges. ECF No. 173 at 5, 27-28.

1 Casutt laundered the loan proceeds by issuing a series of checks to himself, family
2 members, and other individuals, writing “back pay” or “pandemic pay” in the memo lines. ECF
3 No. 154 at 11. These checks were then deposited into an account controlled by Casutt under his
4 charitable foundation’s name. The foundation, under Casutt’s direction, then used the funds to
5 purchase a house in Henderson, Nevada. Casutt pleaded guilty to one count of wire fraud and
6 one count of concealment money laundering.

7 **II. ANALYSIS**

8 **A. Ineffective Assistance of Counsel**

9 Casutt argues that his various lawyers² were ineffective for (1) representing him despite
10 conflicts of interest, (2) pressuring Casutt into taking a plea deal, (3) failing to challenge the
11 warrant application and indictment, and (4) not adequately pursuing a motion to withdraw
12 Casutt’s plea. The government responds that most of Casutt’s complaints are tactical decisions
13 that are within the range of reasonable representation and that Casutt has not demonstrated
14 prejudice from his counsel’s performance.

15 To prevail on an ineffective assistance of counsel claim, Casutt must prove that (1) his
16 attorney’s “representation fell below an objective standard of reasonableness,” and (2) his
17 attorney’s deficient performance prejudiced Casutt such that “there is a reasonable probability
18 that, but for counsel’s unprofessional errors, the result of the proceeding would have been
19 different.” *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). I must apply a “strong
20 presumption that counsel’s conduct falls within the wide range of reasonable professional
21 assistance.” *Id.* at 689. “Counsel’s failure to make a futile motion does not constitute ineffective
22 assistance of counsel.” *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994). The right to effective
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² Casutt was represented by different lawyers at various times during the pendency of this case.

1 assistance applies during “critical stages” of criminal proceedings, including plea bargaining.
2 *Missouri v. Frye*, 566 U.S. 134, 140 (2012) (quotation omitted).

3 1. Conflict of Interest

4 Casutt argues that his initial attorney, Assistant Federal Public Defender Brian Pugh, had
5 a conflict of interest because Pugh was friends with “the guy that was lying about [Casutt].” ECF
6 No. 251 at 9. Casutt does not clarify who this friend is. Additionally, Casutt asserts that Pugh
7 was a former prosecutor who at one point had one of the convictions he had secured overturned
8 due to misconduct, which made Pugh unwilling to accuse the prosecution in this case of
9 misconduct. The government responds that Casutt fired Pugh early in his case and received
10 representation from other competent attorneys for the remainder; thus Casutt cannot show that
11 any conflict affected performance or resulted in prejudice.

12 The Sixth Amendment right to counsel includes a “correlative right to representation that
13 is free from conflicts of interest.” *Wood v. Georgia*, 450 U.S. 261, 271 (1981). To demonstrate
14 that he received unconstitutional representation due to a conflict, Casutt must “demonstrate that
15 an actual conflict adversely affected his lawyer’s performance.” *Lockhart v. Terhune*, 250 F.3d
16 1223, 1230 (9th Cir. 2001) (quotation omitted). An actual conflict is “a conflict that affected
17 counsel’s performance—as opposed to a mere theoretical division of loyalties.” *United States v.*
18 *Walter-Eze*, 869 F.3d 891, 901 (9th Cir. 2017) (quotation omitted). Casutt need not show actual
19 prejudice, only that “the attorney’s behavior seems to have been influenced by the conflict.”
20 *Lockhart*, 250 F.3d at 1231 (quotation omitted). “To establish an ‘adverse effect’ [Casutt] must
21 show that some plausible alternative defense strategy or tactic might have been pursued but was
22 not and that the alternative defense was inherently in conflict with or not undertaken due to the
23 attorney’s other loyalties or interests.” *Walter-Eze*, 869 F.3d at 901.

1 Casutt had his initial appearance on August 25, 2020. ECF No. 4. Pugh entered his
2 appearance on September 8. ECF No. 19. Pugh made no motions in this case and Casutt moved
3 for new counsel on March 3, 2021. ECF No. 38. On March 15, Magistrate Judge Koppe held a
4 hearing, after which Pugh was replaced by another assistant federal public defender, who entered
5 her appearance on March 23. ECF Nos. 41; 42. The new attorney and her cocounsel represented
6 Casutt for nearly two years throughout pretrial proceedings up until Casutt moved to withdraw
7 his guilty plea in January 2023. ECF Nos. 170; 175.

8 Casutt has not shown that Pugh had an actual conflict or even a mere theoretical division
9 of loyalties. According to Casutt, Pugh told him that Pugh “had a good relationship with the
10 prosecution, referring to them as friends and good people.” ECF No. 38 at 1. According to
11 Casutt, this “conflict” made Pugh unwilling to file more adversarial motions accusing the
12 prosecution of misconduct. The same could be said for many public defenders, regardless of
13 their prior experiences, who maintain an amicable relationship with the prosecutors they face in
14 court daily. Casutt must show that the conflict affected Pugh’s performance. And even after
15 Casutt received new counsel, those attorneys declined to pursue Casutt’s misconduct allegations
16 because they did not believe the motions were meritorious. *See* ECF No. 180 at 9-11 (sealed).³

17 Even if there was an actual conflict, it did not adversely affect Pugh’s performance. Pugh
18 was Casutt’s attorney for only a few months and prior to any significant litigation in the case.
19 Casutt identified what he perceived as a conflict and asked to replace Pugh, and Pugh was
20 replaced. Casutt then had ample opportunity to ask his new counsel to raise the concerns Casutt
21 believed Pugh was unwilling to raise. Casutt argues that even after Pugh was no longer his
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23 ³ Because Casutt places his attorneys’ decisions at issue, I will deem the attorney-client privilege
waived for the narrow purpose of deciding this motion.

1 attorney, the same paralegals and other staff from the federal public defender's office remained
2 on his case. But he offers no evidence to impute any perceived conflict Pugh had to any other
3 persons in his office. Casutt received representation free from actual conflicts, so I deny his
4 motion as to conflicts of interest.

5 2. Pressure to Plead Guilty

6 Casutt argues that Pugh pressured him to accept a plea by saying he had the "WORST
7 JUDGE in this district" who "sentences more severely [than] any other judge." ECF No. 251 at
8 9. Casutt also asserts that Pugh threatened to subject Casutt to a psychological exam and find
9 him unfit to make his own decisions so Pugh could enter a plea without Casutt's resistance. The
10 government does not specifically respond to this argument but asserts that Casutt failed to meet
11 his burden on both ineffective assistance and prejudice.

12 An attorney applying undue pressure or threats to coerce a client into pleading guilty
13 could fall beneath the standard of reasonable representation. *See Iaea v. Sunn*, 800 F.2d 861,
14 866-67 (9th Cir. 1986) (acknowledging holdings where coercion by defense counsel can render a
15 plea involuntary). But even if these claims are true, Casutt cannot show that he was prejudiced
16 by this pressure. As already mentioned, Casutt fired Pugh early in this case and continued with
17 other counsel. At no time was Casutt deemed incompetent or unfit to make his own decisions in
18 this case. And although Casutt did eventually plead guilty, it was years after Pugh was removed
19 from the case and after vigorous litigation by Casutt's new attorneys. Casutt has not pointed to
20 any evidence to show that it was Pugh's alleged pressure that caused him to plead guilty, or that
21 he would not have pleaded guilty if not for that pressure. Thus, I deny his motion as to pressure
22 to plead.

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1 3. Failure to Challenge Warrant and Indictment

2 Casutt argues his attorneys were ineffective assistance for not challenging the search
3 warrant for his home and electronic devices because the government made false statements in the
4 supporting affidavit. Casutt claims that a similar false statement was made to secure his
5 indictment. Casutt identifies two statements in the warrant and indictment that he claims were
6 false:⁴ (1) a reference to Casutt's foundation and whether it needed to report to the state
7 unemployment fund, and (2) that PPP loan proceeds must be used on certain permissible
8 expenses. The government responds that Casutt's attorneys made tactical decisions not to raise
9 these challenges and Casutt has not shown that the result would have been different if his
10 attorneys had raised them.

11 Casutt's attorneys made a reasonable strategic decision not to raise these arguments.
12 The attorneys challenged the search and statements Casutt made to investigators during the
13 search on other grounds in a motion to suppress. ECF Nos. 48; 60. Magistrate Judge Koppe held
14 a hearing on that motion, and after Casutt received an unfavorable ruling his attorneys objected
15 to Judge Koppe's findings, which I denied. ECF Nos. 64; 66; 69; 70; 82. During the hearing on
16 Casutt's first motion to withdraw his plea, Casutt acknowledged that he raised his concerns about
17 the supposed false statements with his counsel, who stated that at least three attorneys looked at
18 the issue and "litigated it the way that we believed it could have been litigated under precedent."

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22 ⁴ Casutt identifies other statements in his reply brief. ECF No. 264 at 3. But because he raises
23 these arguments for the first time in reply and the government has had no opportunity to respond,
I need not consider them. *See Zumani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district
court need not consider arguments raised for the first time in a reply brief."). Even if I were to
consider these statements, Casutt fails to show that it was ineffective assistance to not challenge
them or that such a challenge would lead to a different outcome.

1 ECF No. 180 at 9-11 (sealed). This strategic decision falls within the wide range of reasonable
2 assistance.

3 Casutt has also not shown that he was prejudiced by demonstrating that the outcome
4 would have been different had his attorneys brought these challenges. The search warrant
5 affidavit stated that Casutt's charitable foundation had not made contributions to unemployment
6 insurance, which was one of three reasons given to demonstrate that a representation on one of
7 the loan applications was likely false. ECF No. 57 at 12. A charitable employer in Nevada may
8 opt out of unemployment contributions by filing a written notice with the state Administrator.
9 Nev. Rev. Stat. § 612.553(2)(b). But Casutt does not claim that his foundation ever filed the
10 required notice or explain how the government's incomplete representation of this law
11 undermines the search warrant's probable cause.

12 The second statement Casutt asserts is false and should have been attacked is "PPP loan
13 proceeds must be used by the business on certain permissible expenses—payroll costs, interest
14 on mortgages, rent, and utilities." ECF No. 57 at 9. Casutt claims that the loans could be used to
15 pay for anything and that these enumerated expenses only apply to whether the loan is
16 forgivable. And because the period to apply for loan forgiveness or begin paying back the loan
17 had not yet run, Casutt argues he could have still complied with the law by repaying the loan.
18 But Casutt was not accused of abusing the loan forgiveness provision. Rather, he was accused of
19 making false statements on the loan application, which included how he would spend the loan
20 proceeds, the number of existing employees, and the amount of monthly payroll. *See id.* at 11-14.
21 Casutt has not established that the government's statement about the PPP's requirements was
22 material to finding probable cause for either the search warrant or indictment.

1 Casutt has not demonstrated that his attorneys' decision not to challenge the statements
2 used to obtain the search warrant and indictment fell outside the wide range of reasonable
3 representation or that he was prejudiced by the decision. I therefore deny his motion on those
4 grounds.

5 4. Motion to Withdraw Plea

6 Casutt argues that his final counsel, Chris Mishler, who was appointed after Casutt
7 moved to withdraw his plea, failed to pursue arguments Casutt made in his pro se motion to
8 withdraw his plea. According to Casutt, Mishler did not pursue these arguments because he had
9 a prior relationship with Casutt's earlier counsel (Casutt does not clarify which previous counsel)
10 and they remained friends. Casutt raises this argument for the first time in his reply brief, so I
11 need not consider it. *See Zumani*, 491 F.3d at 997. But even if I were to consider its merits, it
12 fails for the same reasons as his other ineffective assistance claims.

13 Casutt claims that Mishler agreed his plea deal should be withdrawn but was constrained
14 by his friendship with prior counsel. But Mishler moved to withdraw Casutt's plea, albeit
15 making a different argument than Casutt's pro se motion. *See* ECF Nos. 170; 191. Mishler made
16 the strategic decision to present an argument he believed was supported by law. Casutt has not
17 demonstrated that this decision fell outside the wide range of reasonable representation. And
18 Casutt has not demonstrated that had Mishler maintained Casutt's arguments, the outcome would
19 have been different. I therefore deny Casutt's motion based on Mishler's failure to withdraw his
20 plea agreement.

21 **B. Prosecutorial Misconduct**

22 Casutt's claim of prosecutorial misconduct is based on the same allegedly false
23 statements in the search warrant affidavit and used to secure his indictment. The government

1 denies engaging in misconduct and argues that Casutt waived these challenges in his plea
2 agreement and has not shown that any of these statements prejudiced him. Casutt replies that the
3 government made false statements about the amount of PPP loans Casutt spent. He also asserts
4 in his reply that the government withheld the fact that Casutt made “rent payments” to his
5 foundation when securing the search warrant and indictment.

6 As part of his plea agreement, Casutt waived “all collateral challenges, including any
7 claims under 28 U.S.C. § 2255, to [Casutt’s] conviction, sentence, and the procedure by which
8 the district court adjudicated guilt and imposed sentence, except non-waivable claims of
9 ineffective assistance of counsel.” ECF No. 154 at 17. The Constitution requires that a guilty
10 plea be voluntary and that Casutt “make related waivers knowingly, intelligently, and with
11 sufficient awareness of the relevant circumstances and likely consequences.” *United States v.*
12 *Ruiz*, 536 U.S. 622, 629 (2002) (simplified). Casutt need only be aware of what rights he is
13 waiving in general even if he is unaware of the specific detailed consequences. *Id.* For example,
14 a defendant may enter a knowing, intelligent, and voluntary guilty plea despite misapprehending
15 the quality of the State’s case, misapprehending likely penalties, or where his counsel failed to
16 find a potential constitutional infirmity in grand jury proceedings. *Id.* at 630-31 (collecting
17 cases); *see also United States v. McCloud*, No. 21-16264, 2023 WL 3018064, at *1 (9th Cir. Apr.
18 20, 2023) (denying § 2255 motion in part because the prosecutor’s misrepresentations or
19 omissions at suppression hearing did not induce defendant to plead guilty).

20 Even if Casutt is correct that the government misstated facts or law while obtaining the
21 search warrant and indictment, he pleaded guilty voluntarily and knowingly with an
22 understanding of the nature of the charges against him and the consequences of his plea. *See*
23 ECF No. 173 at 5-16, 20-23. Casutt acknowledges that he has been pointing out these alleged

1 misrepresentations since early in his case while Pugh was still his attorney. *See* ECF No. 251 at
2 9. His disagreement about Nevada unemployment law did not induce his guilty plea because he
3 did not plead guilty for nearly two more years. Similarly, Casutt does not argue that the
4 government not giving the grand jury information about the rent payments induced his guilty
5 plea. And even if this omission had induced his plea, the prosecution was not obliged to present
6 to the grand jury evidence of the rent checks. *See United States v. Williams*, 504 U.S. 36, 52-54
7 (1992) (declining to require prosecutors to present exculpatory evidence to grand juries).

8 Casutt's assertion that the plea agreement misstated the amount of PPP money he spent
9 also did not render his plea involuntary or unknowing. Casutt swore under oath that he had read
10 the plea agreement and that the factual basis for his plea was true. ECF No. 173 at 5, 8, 26-27.
11 And the amount of PPP money spent was not an element of either wire fraud or concealment
12 money laundering, which were the two counts Casutt pleaded guilty to. The amount spent was
13 not even material to sentencing because the plea agreement identified the intended loss of
14 \$5,764,480 as the relevant amount for sentencing, and Casutt does not dispute this amount. ECF
15 No. 154 at 13-14. Casutt points to no evidence that the allegedly incorrect figure about how
16 much he spent induced him to plead guilty.

17 None of the government statements Casutt asserts are false prevented him from entering
18 an intelligent, knowing, and voluntary guilty plea or waiving related rights. Consequently, I
19 deny Casutt's motion as to prosecutorial misconduct.

20 **C. Actual Innocence**

21 Casutt argues that the proffered testimony of his expert witness demonstrates that he is
22 actually innocent of wire fraud. The government responds that it does not understand Casutt to
23 be making a claim of factual innocence, as opposed to legal insufficiency, and that the expert

1 witness's opinion is not sufficient to show that Casutt did not commit wire fraud. Casutt clarifies
2 in his reply that he is arguing that he is actually and factually innocent.

3 Casutt may seek collateral review of his plea "if he can establish that [a] constitutional
4 error in his plea colloquy has probably resulted in the conviction of one who is actually
5 innocent." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quotation omitted). "It is
6 important to note in this regard that 'actual innocence' means factual innocence, not mere legal
7 insufficiency." *Id.* To show that he is actually innocent, Casutt "must demonstrate that, in light
8 of all the evidence, it is more likely than not that no reasonable juror would have convicted him."
9 *Muth v. Fondren*, 676 F.3d 815, 819 (9th Cir. 2012) (quotation omitted). Because Casutt entered
10 into a plea agreement, his showing of actual innocence must extend to charges forgone by the
11 government during plea bargaining. *Bousley*, 523 U.S. at 624.

12 Casutt has not demonstrated that, in light of all of the evidence, no reasonable juror
13 would have convicted him. Casutt relies on law professor Shaun Martin's proffered testimony
14 that banks were being encouraged to approve pandemic relief loans without underwriting or
15 investigating, thus rendering any misrepresentations on loan applications immaterial. *See e.g.*,
16 ECF No. 161 at 14, 16-17, 35-37, 42-44. Professor Martin concluded that nothing in this case
17 would meet the Ninth Circuit standard of materiality. *Id.* at 61. But Professor Martin's testimony
18 is not the law. A jury would be free to disregard his testimony in favor of other evidence. And
19 the government would be able to cross examine Professor Martin to test his credibility.
20 Considering other available evidence, a reasonable juror might not believe Professor Martin's
21 assertion that nothing in Casutt's loan applications was material. For example, evidence shows
22 that some bank officials requested additional supporting documents to verify Casutt's payroll and
23 tax information and ultimately rejected his loan applications. *See* ECF Nos. 207-5; 207-6; 154 at

12-13; *see also* ECF No. 161 at 42-43 (Professor Martin testifying that if lenders knew the representations made to them were untrue that “would make a difference” because if they knew that the information the applicant provided was false, “they shouldn’t have lent,” would have been “participants in the fraud,” and lenders generally “did not want to be subjected to criminal liability for that”). Because Casutt has failed to meet his burden to establish that he is actually innocent of wire fraud and concealment money laundering, I deny his motion on that ground.

7 **D. Defective Warrant and Indictment**

8 Casutt argues that the government’s search warrant application and indictment were
9 deficient because the government used false statements to obtain the warrant and indictment and
10 because the government withheld exculpatory information from those applications. The
11 government does not directly address this argument but responds that Casutt waived any such
12 collateral attacks in his plea agreement.

13 Casutt waived these arguments in his plea agreement. ECF No. 154 at 17. And as I
14 discussed with respect to his ineffective assistance of counsel claim, Casutt has not shown that
15 these alleged misrepresentations were material. I therefore deny his motion as to the search
16 warrant application and indictment.

17 **III. CONCLUSION**

18 I THEREFORE ORDER that defendant Brandon Casutt’s motion to vacate, set aside, or
19 correct his sentence (**ECF No. 251**) is **DENIED**.

20 I FURTHER ORDER that no certificate of appealability shall issue because reasonable
21 jurists would not find my assessment of the constitutional claims debatable or wrong and the
22 questions presented do not deserve encouragement to proceed further.

1 I FURTHER ORDER the Clerk of Court to enter a separate civil judgment denying
2 defendant Brandon Casutt's § 2255 motion. The Clerk shall file this order and the civil
3 judgment in this case and in the related civil case number 2:24-cv-01882-APG.

4 DATED this 16th day of May, 2025.

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8 ANDREW P. GORDON
9 CHIEF UNITED STATES DISTRICT JUDGE
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